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No. 85-1323

IN THE

Supreme Court of the United States

GEORGE D. KING,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

While petitioner has adequately presented the procedural history of the case, he has not presented fully or fairly the facts which underlie the Eighth Circuit's conclusion that a directed verdict could have been granted if a jury had been empaneled. While the facts are in large part set forth in the Eighth Circuit's opinion, the relevant facts will be briefly summarized.

Dr. King was hired by the University in 1970 as a full professor in the College of Liberal Arts at the University of Minnesota with a tenured appointment in the Afro-American Studies Department.[1] Petitioner was the chair of the department from 1970 to 1974, when all the members of his department except one asked him to step down as chair.

From 1974 to his termination, petitioner was employed as a faculty member in the department teaching four courses. Two of the courses were introductory and two of the courses were seminars.

Throughout the period from 1974 to his termination, there were numerous complaints about petitioner's performance by students, faculty, and the chair of the department. There were both oral and written complaints from students. While the complaints involved all areas of performance, excessive absenteeism was a consistent complaint.

During this same period, the introductory courses petitioner taught had chronically low enrollment. For example, from 1977 to 1982, the introductory courses petitioner taught averaged 12 students and 6 students respectively. In addition to petitioner's poor reputation as a teacher, these enrollments were also due, at least in part, to petitioner's practice of offering them repetitively and often out of sequence. Prior to petitioner's teaching, these same courses attracted 100 to 200 students.

Each year petitioner's performance was reviewed to determine a salary merit increase. His department uses a Merit Advisory System of three faculty members in the department to review the activity and performance of each person and to recommend increases to the chair. The chair then makes a written review and recommendation to the Dean.

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[1] Later renamed Afro-American and African Studies Department.

During the entire period, Dr. King was recommended for an increase in only one year, 1979-80. In that year the chair, Dr. Southall, indicated that the increase was not really a merit increase but an acknowledgement that Dr. King had no recorded absenteeism or student complaints in that year. In all other years, Dr. King's contributions in teaching, research and service were severely criticized by his colleagues and the departmental chair who recommended no merit increase.[2]

In subsequent years, petitioner's performance did not improve, provoking complaints from the departmental chair about low enrollments and his "failure to be the historian/teacher that his inflated salary and professorial rank warrants". *King v. University of Minnesota, et al.*, 774 F.2d 224, 225-226 (8th Cir. 1985).

Beginning in Fall, 1980, the department was under the direction of a new chair, Earl Scott, who almost immediately received student complaints about petitioner's performance and absence from class. In Spring, 1981, Dr. Scott actually monitored petitioner's class attendance. Petitioner was absent on several occasions and Dr. Scott had to dismiss petitioner's classes because of his absence.

Dr. Scott brought these matters to the attention of the Dean. In February, 1982, after getting no response from the Dean to this continuing problem, Dr. Scott and three other members of the department wrote to the Dean about their festering personnel problems and the Dean's failure to remove un-

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[2] In 1978, in response to a series of written complaints from students and from the departmental chair, the petitioner was required to meet with the Dean of the College. The Dean discussed with petitioner each of the student complaints and petitioner's responsibilities to the University and his students. The Dean warned the petitioner that if his performance did not improve, the College would consider taking serious measures, including a possible dismissal for cause.

cooperative and unproductive members. They asked for some clear action with respect to the petitioner.

In February, 1982, the Dean wrote to petitioner, warning him about his lack of performance in teaching, research and service, the lack of students in his courses, his refusal to cooperate in enhancing his courses and his lack of commitment to the department or the University. The Dean detailed his dissatisfaction and his perception of the department's dissatisfaction with petitioner's teaching performance and the declining enrollments in his courses. The Dean asked the department to review these matters.

On March 12, 1982, the departmental faculty voted 9-2 with one abstention to remove petitioner from the department because of his continuing unacceptable teaching, scholarship and service. During the next several months, the Dean asked the petitioner to take a series of actions to enhance his performance. At the end of fall quarter 1982, having heard nothing from the petitioner, the Dean investigated and found that Dr. King had not completed the requested actions.

Accordingly, on February 15, 1983, the Dean sent a letter to petitioner initiating removal proceedings under the Tenure Code and giving petitioner notice of the charges against him. In his letter, the Dean stated:

> Therefore with this letter and its carbon to President Magrath, I am initiating proceedings for your permanent removal for cause as of June 15, 1983. The patterns of repeated inaction on your part which lead me to take this action are raised in my letters of February 24, April 9, and June 10, all of 1982.

These earlier letters were specific statements of dissatisfaction with petitioner's teaching, enrollments, absences, failure to develop courses and lack of graduate faculty status.

Petitioner requested and was granted a hearing before the Senate Judicial Committee, which appointed a panel of three faculty members to hear the case. Prior to the hearing, petitioner was represented by counsel and was allowed substantial document discovery. Petitioner's attorney took the depositions of Dean Lukermann, Professor Scott and former Dean Sorauf prior to the internal hearing. Also prior to the hearing, there was an exchange of issue lists, witness lists, and exhibit lists.

The hearing was held for eight days, from June 4-17, 1983. Petitioner was present at the hearing and, through counsel, cross-examined witnesses, presented witnesses on his own behalf, presented documentary evidence, and made oral and written argument.

On September 15, 1983, the panel issued its Final Findings and Recommendations in which it unanimously recommended that petitioner be terminated for cause under the Tenure Code. In accordance with the Tenure Code, the Final Findings and Recommendations were sent to the President of the University for review. After submission of briefs by both sides, the University President reviewed the Final Findings and Recommendations and issued his recommendation to the Board of Regents. He agreed with the panel and recommended that petitioner be terminated.

The matter was considered by the Board of Regents of the University of Minnesota on December 8, 1983. Prior to that time, each of the parties had had an opportunity to send written arguments to the Board of Regents and the transcripts of the hearings and all exhibits introduced at the hearing were available to the Regents. At the meeting, petitioner's attorney argued on his behalf and submitted a series of new affidavits. After the arguments the Regents went into closed session and decided to adopt the panel's finding, but to place petitioner on probation for a year rather than terminate him.

On December 14, 1983, the University president wrote to the Regents asking them to rescind their actions. His reasons were that the additional affidavits submitted at the Regents' meeting were given inappropriate weight and the decision was contrary to the findings which were adopted. He argued that this inconsistency made it difficult to ascertain or maintain any standard of performance for petitioner's proposed probation or for the faculty as a whole. A copy of the letter was sent to petitioner and his attorney.

The parties were again allowed to brief this matter to the Regents and orally argue it to them. After hearing the arguments, the Regents voted to rescind their previous action and decided to terminate petitioner for cause effective January 15, 1984.

ARGUMENT

A. There Is No Important Undecided Question Of Federal Law In This Case.

Petitioner's first reason for granting the writ of certiorari is that this Court should decide "whether a federal judge has the authority to convert an action at law into a suit in equity." Petition at 5. This is not an appropriate basis for review for three reasons. First, the issue was never decided by the Eighth Circuit. Second, the issue is irrelevant since the Eighth Circuit held that the District Court could have granted a directed verdict, thus obviating the need for a jury. Third, the District Court did not convert this action from a suit at law to one in equity, rather, when it granted summary judgment on all the damage claims, it concluded that plaintiff no longer had a right to a jury trial. Pet. App. at 23-24.

In its opinion, the Eighth Circuit analyzed each of Petitioner's claims on the merits, concluding with respect to the due process and first amendment claims that the District Court "properly could have directed a verdict for defendants" and, with respect to his race discrimination claim, that petitioner had "failed to establish a *prima facie* case of discrimination." 774 F.2d at 228-229. With respect to petitioner's jury trial claim, the Eighth Circuit explicitly stated that it did not reach the issue, indicating as follows:

> We do not reach the merits of King's contention that his damage claims were improperly struck or his contention that he was entitled to a jury trial . . . We further note that since King would not have been denied his constitutional right to a jury trial had the District Court simply entered a directed verdict for defendants, the failure of

> the District Court to grant King a jury trial in the present case was also, at most, harmless error.

774 F.2d at 229 (citations omitted).

While the Eighth Circuit's failure to reach the issue does not preclude this Court from considering it, the reason given for not reaching the issue is compelling and should persuade this Court not to review the jury trial issue. That is, since the evidence presented was not strong enough to overcome a directed verdict motion if a jury had been empaneled, the presence or absence of a jury makes no difference since it would have played no role in the decision. It is difficult to see how petitioner was harmed by the absence of a jury to which no questions would have been presented. Since any error caused no harm, the Eighth Circuit properly did not consider the issue.

Finally, the question petitioner seeks to present inaccurately states the actions of the District Court. In a misguided attempt to perjoratively characterize the District Court, petitioner claims that the District Court judge "converted" the action from one at law to one in equity. Petition at 5. In actuality, the respondents', defendants below, motion for summary judgment on petitioner's damage claims was granted. Pet. App. at 22-23. In the absence of any remaining damage claims, respondents objected to the empaneling of a jury. *Id.* The District Court properly concluded that there was no longer a constitutional right to a jury trial. *Id.* There was no "conversion" of petitioner's action.

While it is difficult to tell what issue petitioner is attempting to present, it is clear that the District Court's ruling on the jury trial issue after dismissal of the damages claims was correct and certainly raises no novel or undecided issue of federal law worthy of this Court's review. Petitioner's posi-

tion appears to be that since he *sought* legal relief in his complaint, even though it is no longer available, he is entitled to a jury trial. Petition at 6. This is contrary to the holdings of this Court and does not raise a substantial question meriting review.

The right to trial by jury is determined by the issues, not the pleadings. *Dairy Queen v. Wood*, 369 U.S. 469, 477-78 (1962); *Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1158 (5th Cir. 1982), citing 9 Wright & Miller, *Federal Practice and Procedure* § 2304 (1971) and *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d 705, 709-710 (6th Cir. 1979). See *In Re Vorpahl*, 695 F.2d 318, 320 (8th Cir. 1982).

The Seventh Amendment requires a jury trial for actions which are legal and does not require a jury trial in actions which are equitable. *Parsons v. Bedford*, 7 L.Ed. 732 (1830); *Curtis v. Loether*, 415 U.S. 189, 193-194 (1974); *In Re Vorpahl*, 695 F.2d at 322. The result depends on the nature of the issue which is analyzed by considering: 1) premerger custom with reference to such questions; 2) the remedy sought; and 3) the practical abilities and limitations of juries. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). The predominant practical consideration has been the nature of the relief available. *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d at 708.

After dismissal of the damage claims, the only remaining relief at issue was the appellant's request for a series of orders from the court to the University to reinstate, to purge appellant's file, to cease unconstitutional treatment, and to permanently restrain and enjoin defendants from terminating appellant. Supplemental Amended Complaint, Prayer for Relief 1-4. All of these orders are traditional equitable relief

which provide no right to a jury trial. *Katchen v. Landy*, 382 U.S. 323, 337 (1966); *Lee v. Crowse*, 284 F.Supp. 541, *aff'd.*, 396 F.2d 952 (10th Cir. 1968) (no jury trial under 42 U.S.C. § 1983 for injunctive relief); J. Moore, 5 Federal Practice, ¶ 38.24[1]. This was true prior to the merger of law and equity and remains true today. Since appellant's damage action was properly dismissed, and since the remaining claims were solely for equitable relief, he had no constitutional right to a jury trial and the district court properly struck the jury demand.

B. Circuit Decisions Are In Agreement That The Denial Of A Jury Trial Is Harmless Error Where A Court Properly Could Have Granted A Directed Verdict.

Petitioner's second argument in support of his petition is that there is a conflict among the Circuits. Again, petitioner's argument is not clear. It is either that the Eighth Circuit applied an incorrect directed verdict standard or that the procedure of analyzing the evidence to see if a directed verdict could have been granted, when a jury trial has been denied, is inappropriate. In making these arguments, petitioner has incorrectly stated what the Eighth Circuit did and has failed to properly analyze what the other Circuits have held. In any event, he has totally failed to show any conflict among the Circuits.

Petitioner references only the Fifth Circuit in attempting to create a Circuit conflict, apparently with respect to the review standard. However, he misstates the standard to be applied even in that Circuit when he states that "denial of a jury trial is reversible error if there were any factual disputes." Pet. at 8. In *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980), the appellee and the district

court had both recognized that failure to grant appellant's motion for a jury trial had constituted error. The issue the Fifth Circuit considered, then, was whether or not a directed verdict had been proper, thereby rendering the error harmless. In enunciating the review standard previously announced in the Fifth Circuit for the directed verdict they stated, *inter alia*, "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper . . . There must be a conflict in substantial evidence to create a jury question." *Id.* at 752. This is not a standard of "any factual dispute".

More importantly, petitioner has failed to recognize or understand the Eighth Circuit's action in this case. Petitioner's procedural due process claim was dismissed "on the basis of uncontradicted evidence". 774 F.2d at 228. The racial discrimination claim was dismissed because there was "no evidence presented from which a discriminatory motive . . . could have been inferred." *Id.* The first amendment claim was dismissed because there was "no evidence that any one involved with his termination was ever aware of his in-class statements." 774 F.2d at 229. The Eighth Circuit did not resolve factual disputes but relied on uncontradicted evidence or an absence of evidence. There is no conflict between the Eighth and Fifth Circuits on this point.

With respect to the procedure used by the Eighth Circuit, they did what other circuits have done when faced with a question of a denial of a jury trial. *Laskeris v. Thornbough*, 733 F.2d 260 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 260 (1984); *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980); *King v. United Benefit Insurance Company*, 377 F.2d 728 (10th Cir. 1967). They determined whether a

directed verdict would have been appropriate against each of the claims brought forward and, therefore, if error did occur, whether it was harmless.

Petitioner criticizes the Eighth Circuit's reliance on *Laskaris v. Thornbough*, 733 F.2d 260 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 260 (1984) for precedent, claiming the case is inapplicable because that trial court had, in fact, granted a motion for directed verdict. Again, petitioner has misread or misrepresented the Third Circuit case. In *Laskaris*, the trial court granted a motion to strike the jury, the plaintiffs presented their evidence and then the court considered several motions to dismiss under Fed. R. Civ. P. 41(b) filed by separate defendants. The court granted the Rule 41(b) dismissal against only one defendant. After trial the court granted another 41(b) motion, under the rule a decision on the merits, and decided on the merits for two remaining defendants.

The review by the Third Circuit, therefore, considered whether a directed verdict *would* have been warranted. The Third Circuit, like the Eighth, reviewed the evidence comprising the record and concluded that there was no minimum quantum of evidence from which a jury might reasonably afford relief. 733 F.2d at 266.

The Tenth Circuit is also in agreement. In *King v. United Benefit Insurance Company*, 377 F.2d 728 (10th Cir. 1967), a trial judge denied a jury erroneously believing it was not demandable as of right in the circumstances. Again, the circuit court considered the evidence submitted to determine if the denial of jury trial was harmless error. The Tenth Circuit cites supporting cases in the Second, Seventh and Eighth Circuits. 377 F.2d at 731.

The agreement in the circuits is founded on the concept that "error must be disregarded unless the losing party was

prejudiced by it." Barron & Holtzoff, *Federal Practice and Procedure*, (Wright ed.), § 1354.1, p. 452. The Eighth Circuit determined after a careful review of an extensive record that a directed verdict could have been entered against King on each of his complaints. Thus, if an error occurred, it caused no harm.

CONCLUSION

There is no important undecided question of federal law or a conflict among the Circuits presented by this case. There is only a very weak claim which was unable to be supported by evidence which was justly decided by both the Eighth Circuit and the District Court. The writ of certiorari should be denied.

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Respectfully submitted,

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